v. *Grand Trunk Ry. Co.*, 38 Vt. 294. The courts which adopt it reason that, while the defendant's liability is created by only a single act on his part, yet that act is in violation of two rights, — the common law right of the deceased to personal immunity and the statutory right of his relatives to his life. The wrong in one action is the personal injury, and the statute of limitations runs from the time of such injury. The damages are for the physical suffering and the financial loss of the deceased up to and ending with the time of death. *Muldowney* v. *Ill. Cent. Ry. Co.*, 36 Ia. 462. The sum recovered becomes part of the general estate and is subject to the claims of creditors. In suits for the death, however, the wrong is causing the death, and the period of limitation, which is expressly provided by the majority of such statutes, runs from the time of death. The damages are restricted to the pecuniary loss to relatives resulting from the death, which are, of course, subsequent to it in time. *Needham* v. *Grand Trunk Ry. Co.*, *supra*; *Kelley* v. *Cent. R. R. of Ia.*, 48 Fed. Rep. 663. Though the personal representative of the deceased may be the plaintiff in both suits, still that he is regarded as acting in different capacities is shown by a decision that facts established in one action are not *res adjudicata* for the purposes of the other. *Leggott* v. *Great Northern Ry.*, L. R. 1 Q. B. D. 599. The recovery in the action for death is solely for the benefit of relatives, and creditors of the deceased have no rights in the sum recovered. *Cf. Gores* v. *Graff*, 77 Wis. 174. If the double remedy is allowed, therefore, both the creditors and the relatives are compensated, whereas the contrary view must regard one or the other as having sustained *damnum absque injuria*, — a result certainly not in keeping with the purpose of this legislation. See 9 & 10 VICT., c. 93.

It is true that since the view advocated involves the doctrine that recovery by the administrator for the personal injury is no bar to an action for the death itself, it is not entirely consistent to hold that if the deceased had before his death recovered for this same personal injury, no subsequent proceedings for the death could be maintained. The latter position, however, is necessary, inasmuch as the usual death act requires that the deceased in such a case be "entitled to maintain an action," at the time of death. *Read* v. *Grt. East. Ry.*, L. R. 3 Q. B. 555. But this inconsistency does not seem to be an objection of decisive weight, as it is due merely to an inadequate wording of the statute. See 28 AM. LAW REG., N. S., 385, 513, 577.

RECENT CASES.

BANKRUPTCY — ACTS OF BANKRUPTCY — PRESUMPTION OF INTENT TO PREFER. — The defendant was alleged to have committed an act of bankruptcy, under § 3, *a*, (2), of the Bankruptcy Act, by having transferred, while insolvent, a portion of his property to certain creditors "with intent to prefer such creditors." *Held*, that, the fact of insolvency at the time of the transfer being doubtful, the intent to prefer will not be presumed. *In re Gilbert*, 112 Fed. Rep. 951 (Dist. Ct., Or.).

The United States courts have always held that where a debtor, knowing his insolvency, transfers property to certain of his creditors, an intent to prefer them will be conclusively presumed. And they have laid down a further rebuttable presumption, where the fact of insolvency is clear, that the debtor had knowledge of his financial condition. *Toof* v. *Martin*, 13 Wall. (U. S. Sup. Ct.) 40; *cf. Mundo* v.

Shepard, 166 Mass. 323, *contra*. These presumptions are applied in cases arising under § 3, *a*, (2), of the present act. *In re McGee*, 105 Fed. Rep. 895. But where, as in the principal case, the fact of insolvency is doubtful, a distinction may well be drawn. For naturally the presumption that a fact is known to one when its existence is peculiarly within his sphere of knowledge, will fail when the truth of that fact is itself uncertain. Accordingly the decision, which seems to be the first on the point, in holding that the intent to prefer must in this case be proved without the aid of a presumption, seems eminently proper.

BANKRUPTCY — JURISDICTION OF FEDERAL COURTS. — Shortly before the filing of the petition in bankruptcy the defendant had received certain money as agent of the bankrupt, and this he refused to deliver to the trustee. The trustee filed a petition before the referee to obtain payment but the defendant, while admitting that the money belonged to the bankrupt, denied the jurisdiction. *Held*, that the court has jurisdiction to issue the order sought. *Mueller* v. *Nugent*, 22 Sup. Ct. Rep. 269.

Under § 2, (7), of the Bankruptcy Act, the federal courts have power to cause estates of bankrupts to be collected and to determine controversies in relation thereto, except as otherwise provided. It is now settled that this power is subject to the provisions of § 23 allowing the trustee, except with consent of the defendant, to bring suit only in courts in which the bankrupt could have sued. *Bardes* v. *Hawarden Bank*, 178 U. S. 524. If therefore the proceedings in the principal case constitute a "suit" by the trustee, the court was without jurisdiction. This result however would be extremely undesirable, since it would hamper bankruptcy proceedings enormously. No question of right or title remained to be determined, for the defendant admittedly held the money as agent of the bankrupt. It seems therefore a fair construction that the court was not entertaining a "suit" by the trustee, but merely issued an administrative order for the collection of the estate.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — LIFE INSURANCE POLICY. — By a semi-tontine policy an insurance company contracted to pay to beneficiaries therein named a certain amount on the death of X, the bankrupt. But if X should be alive at the end of the tontine period, the company promised to pay to X himself a certain amount instead, giving him also other options. § 70, *a*, (5), of the Bankruptcy Act provides that the trustee shall be vested with the title of the bankrupt to all "property which . . . he could by any means have transferred . . . " *Held*, that the policy has an actual value to the bankrupt, which passes to the trustee. *In re Welling*, 113 Fed. Rep. 189 (C. C. A., Seventh Circ.).

There are cases which hold that an ordinary life-insurance policy, payable to the legal representatives of the insured and having no surrender value, does not pass to the trustee. *Morris* v. *Dodd*, 110 Ga. 606. If the ground for this holding is that the insured has no interest in the policy, the decisions have no bearing on the present question; for a policy by which, as in the principal case, a specified amount is payable to the insured if he survives a stated period, constitutes a contract in which the insured has a valuable interest. If the ground is that life-insurance policies are not assignable, the cases seem to be erroneous. By the weight of authority an ordinary life-insurance policy is assignable, unless the assignment is in fact a gaming transaction. *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24; but *cf. Warnock* v. *Davis*, 104 U. S. 775. Subject to the same qualification, the interest of the insured should be transferable by him under the circumstances of the principal case, and the cases so hold. *Brigham* v. *Home Life Ins. Co.*, 131 Mass. 319. That interest would seem therefore to be property which passes to the trustee under § 70, *a*, (5).

CONFLICT OF LAWS — DISPOSITION OF THE PERSONALTY OF AN INTESTATE WITHOUT HEIRS OR NEXT OF KIN. — A domiciled Austrian was the beneficiary of a fund in England. He died unmarried and without heirs. The fund, which was paid into court, was claimed by the Austro-Hungarian and by the English Treasury officials. *Held*, that the fund must be paid into the English Treasury. *In re Barnett's Trusts*, 18 T. L. R. 454 (Eng., Ch. D.).

The distribution of the personalty of an intestate is generally made in accordance with the law of his domicile. *Enohin* v. *Wylie*, 10 H. L. Cas. 1. Since Austrian law gives to the state the property of an unmarried intestate without heirs, it was contended that the Austrian treasury was entitled. This contention would be well founded, if the state could be regarded as claiming by succession. It is submitted, however, that a claim to personalty in such cases is not a claim through the *persona*

of the intestate but a claim to take as *bona vacantia*, because there is no succession. See *Middleton* v. *Spicer*, 1 Bro. C. C. 201; *Taylor* v. *Haygarth*, 14 Sim. 8. The maxim *mobilia sequuntur personam* is applied only on grounds of comity and convenience, and neither demands that it should be extended to cover a case like this. No decisions have been found on the point; viewing it as a speculative question, leading continental jurists are divided in opinion. See GILLESPIE'S BAR, PRI. INTERNAT. LAW, § 114, *accord;* GUTHRIE'S SAVIGNY, PRI. INTERNAT. LAW, 234–235, *contra.*

CONSTITUTIONAL LAW — MARTIAL LAW JURISDICTION OVER CIVILIANS. — Martial law was proclaimed in Cape Colony, and the petitioner was arrested and kept in custody by the military authorities. Neither the district in which he was taken nor the district in which he was held was the scene of active operations, and the ordinary courts were in session. The petitioner asked the Supreme Court of the colony to release him from military custody, and on the refusal of his application prayed the Judicial Committee of the Privy Council for special leave to appeal. *Held*, that the petition must be denied. *In re D. F. Marais*, [1902] A. C. 109 (Eng., P. C.). See NOTES, p. 850.

CONSTITUTIONAL LAW — RECEIVERS — JURISDICTION OF COURT. — A state court rendered a valid judgment *in personam* against a non-resident insurance company. The company subsequently withdrew its property from the state and discontinued its local agencies, notifying policy holders to transact business with the home office. The judgment execution having been returned *nulla bona*, the state court, on petition of the plaintiff, appointed a receiver to collect premiums and accounts due the judgment debtor from persons within the state. The insurance company brought a bill in a federal court to enjoin the receiver from so acting. *Held*, that the fact that no notice of the application for the appointment of a receiver had been given to the company did not invalidate such appointment under the Fourteenth Amendment. *Phelps* v. *Mutual Reserve, etc., Assoc.*, 112 Fed. Rep. 453. See NOTES, p. 849.

CONSTITUTIONAL LAW — STATUTE GIVING ARBITRARY POWER TO OFFICIAL. — A statute provided that whenever in the work carried on in any factory noxious gases were generated and were likely to be inhaled by employees, if it should appear to a certain official that this might be prevented by any contrivance, he should order the same to be used, and a violation of such order should constitute a misdemeanor. *Held*, that the statute is unconstitutional. *Schaezlein* v. *Cabaniss*, 67 Pac. Rep. 755 (Cal.). See NOTES, p. 852.

CORPORATIONS — JUDGMENT AGAINST CORPORATION — CONCLUSIVENESS AGAINST STOCKHOLDERS. — The complainant, having obtained a judgment against a corporation, filed a bill praying for an assessment against the stockholders on unpaid stock subscriptions. *Held*, that the defendants may set up in defence the failure of consideration for the notes on which the judgment was obtained. *McBryan* v. *Universal Elevator Co.*, 89 N. W. Rep. 683 (Mich.).

The rule that a judgment against a corporation is conclusive against the stockholders, unless obtained through fraud or collusion, or from a court without jurisdiction, has been generally applied to suits by judgment creditors to compel payment of unpaid subscriptions. *Ball* v. *Reese*, 58 Kan. 614; *Nichols* v. *Stevens*, 123 Mo. 96. The theory is that the stockholder is in privity with the corporation, and represented by it; and that, since unpaid subscriptions are debts due the corporation, the creditor should be allowed to collect them under his judgment without the necessity of proving his claim again. Some authorities, however, in cases of special hardship, have allowed the stockholders to go behind the record and to show defences which would have been good against the original action. *Saylor* v. *Commonwealth I. & B. Co.*, 38 Or. 204; *Ward* v. *Joslin*, 105 Fed. Rep. 224; *cf. Miller* v. *White*, 50 N. Y. 137. The wisdom of this policy is doubtful; and it seems certain that the right should not be extended to cases where the only special hardship is, as in the principal case, the corporation's failure to set up a clear defence. The contract liability for unpaid subscriptions is to be distinguished from special statutory liabilities, which create assets of a peculiar character. See *Stephens* v. *Fox*, 83 N. Y. 313.

CORPORATIONS — UNPAID STOCK — RIGHTS OF CREDITOR AGAINST TRANSFEREE. — *Held*, that a transferee of stock purporting to be fully paid, who has notice that it is

not in fact fully paid, is primarily liable to creditors of the corporation for the amount remaining unpaid. *Foote* v. *Illinois, etc., Bank*, 62 N. E. Rep. 834 (Ill.). See NOTES, p. 844.

CRIMINAL LAW — HOMICIDE — SELF-DEFENCE. — In a trial for homicide, the court instructed the jury that if the defendant sought a meeting with the decedent with the intention of provoking a quarrel with him and taking his life, the defendant could not justify the killing upon the ground of self-defence. *Held*, that the court erred in denying to the defendant his right of self-defence if he had done no act and used no language of a character to provoke a quarrel. *Johnson* v. *State*, 66 S. W. Rep. 845 (Tex., Cr. App.).

All authorities agree that a defendant in a prosecution for homicide cannot find shelter behind a plea of self-defence, when he has voluntarily created the very necessity which he sets up in justification of his act. See HAWKINS, P. C., c. 10, § 22. This rule applies where the defendant himself began the affray by assaulting the decedent. *Middleton* v. *Commonwealth*, 6 Ky. 51. And a defendant who has voluntarily provoked the affray by the use of insulting language, stands in no better position. *State* v. *Scott*, 41 Minn. 365. It is probable that where a defendant knew that any meeting with the decedent would be likely to result in a murderous attack upon himself, and sought a meeting with the intention thereby to provoke such attack, the same rule would apply. But where he sought the meeting intending by further acts and words to provoke an assault and was attacked without such provocation, he has not created the necessity that he pleads in justification of the killing, and should not be denied the plea of self-defence merely because of his unexecuted intention. 1 HALE, P. C. 479. There are decisions to the contrary in some jurisdictions. *State* v. *Neely*, 20 Ia. 108; *Vaiden* v. *Commonwealth*, 12 Gratt. (Va.) 717.

EQUITY — NECESSARY PARTIES — ORIGINAL JURISDICTION OF SUPREME COURT — NORTHERN SECURITIES CASE. — The state of Minnesota moved for leave to file an original bill in the United States Supreme Court against the Northern Securities Company, a New Jersey corporation, to restrain the latter from controlling two Minnesota corporations. It was alleged, *inter alia*, that all the stockholders in the Northern Securities Company were stockholders in the other corporations and that they held a majority of the stock of each. *Held*, that the two Minnesota corporations are necessary parties defendant, and as the joinder of such parties would defeat the court's jurisdiction, the motion must be denied. *State of Minnesota* v. *Northern Securities Co.*, 22 Sup. Ct. Rep. 308.

Where certain persons are so connected with the transaction which forms the subject of a controversy in equity that a final decree without their presence would necessarily affect their interests, they must be joined as parties, unless adequately represented by a party before the court. *Shields* v. *Barrow*, 17 How. (U. S. Sup. Ct.) 130, 140; *Mallow* v. *Hinde*, 12 Wheat. (U. S. Sup. Ct.) 193. Whether the Minnesota corporations were such indispensable parties is mainly a question of fact, and though it appears unlikely that their joinder would affect the result, the decision of the court, which seems technically correct, is the less to be criticised in view of the large discretion of a court of equity as to such matters. The point as to jurisdiction is fairly plain. The first clause of Art. 3, § 2, of the Constitution, declaring to what cases the judicial power of the United States shall extend, does not include suits by a state against its own citizens; and the second clause, giving the Supreme Court original jurisdiction in cases to which a state shall be a party, is rightly construed as applying only to those cases enumerated in the first clause in which a state may be a party. *Pennsylvania* v. *Quicksilver Co.*, 10 Wall. (U. S. Sup. Ct.) 553. It is further established that if any of the necessary parties defendant are citizens of the state which is the party plaintiff, the jurisdiction is defeated. *California* v. *Southern Pacific Co.*, 157 U. S. 229.

ESTOPPEL — WAIVER OF EXISTING RIGHT — CONTRACT BY ESTOPPEL. — The husband of an intestate brought suit to set aside, for want of consideration, a contract between himself and the next of kin by which both parties agreed to make such releases as should be necessary to carry out the terms of an invalid will. The administrator had made a partial distribution in accordance with this agreement. *Held*, that the plaintiff is estopped to deny the contract. *Williams* v. *Whittell*, 69 N. Y. App. Div. 340.

In general an estoppel can arise only from a misrepresentation of a present fact;

but some courts have given the same effect to a promise which amounts to a waiver of an existing right. *Faxton* v. *Faxon*, 28 Mich. 159. See *Ins. Co.* v. *Mowry*, 96 U. S. 544, 548. In ordinary estoppel, if the representation applies to several matters or things, and the party acting upon it has been influenced only by its application to certain of them, it can be withdrawn as to the others. *White* v. *Greenish*, 11 C. B. N. S. 209. On the same principle, in cases like that under discussion, the plaintiff should ordinarily be bound only to the extent of contributing his share to sums already paid out under the contract, which would not have been payable under intestacy. *Haviland* v. *Willets*, 141 N. Y. 35. But if, in the principal case, there were payments of this sort which would not have been agreed to by the other parties, but for their expectation that the whole arrangement would be carried out, then the plaintiff should be bound as to the entire estate. The decision might also be rested on the ground that the mutual releases were sufficient consideration for each other. *Cf.* *Bunn* v. *Bartlett*, 28 N. Y. St. Rep. 239.

EVIDENCE — HEARSAY — REPORT OF TESTIMONY GIVEN THROUGH AN INTERPRETER. — The defendant was on trial for perjury, the indictment alleging the falsity of testimony given by him through an interpreter at a former trial between other parties. A witness who had not understood the defendant was allowed to give in evidence the defendant's statements as repeated by the interpreter. *Held*, that this evidence should not have been admitted. *State* v. *Terline*, 51 Atl. Rep. 204 (R. I.).

A witness who cannot speak the language of the *forum* may always be required to testify through an interpreter appointed by the court. See *Schearer* v. *Harber*, 36 Ind. 536. Since both the witness and the interpreter are under oath and subject to cross-examination, the hearsay rule is inapplicable. See WHARTON, EV., § 174. The translation becomes the testimony of the witness in the original trial and may be treated as such in subsequent trials between the same parties. See *Schearer* v. *Harber*, *supra*. But where, as in the principal case, it becomes material to prove what the witness himself said, as distinguished from what testimony was given, a difficulty presents itself. In this situation it is hard to meet the objection of hearsay, unless the statements of the witness are testified to by the interpreter himself or by some other person who understood the witness. See *People* v. *Ah Yute*, 56 Cal. 119. Though a report of the testimony as given by the interpreter would be logically much more reliable evidence on the question at issue than most hearsay, such considerations do not affect the absoluteness of the hearsay rule. See THAYER, PREL. TREAT. EV., 521, 522.

INSURANCE — CHANGE IN BUILDING LAWS — AMOUNT OF RECOVERY. — The plaintiff's building, insured by the defendant company, was partially destroyed by fire. A law passed since the issuance of the policy necessitated a different mode of construction, greatly increasing the cost of repair, but not giving to the building thus repaired any added value. *Held*, that the plaintiff is entitled to recover on the policy the cost of repairing in conformity with the ordinance. *Pennsylvania Co., etc.*, v. *Philadelphia Contributorship, etc.*, 51 Atl. Rep. 351 (Pa.).

Where by reason of an ordinance, though passed after the insuring, a building partially destroyed may not be repaired, recovery may be had as for a total loss. *Brady* v. *Northwestern Ins. Co.*, 11 Mich. 425; *Williams* v. *Hartford Ins. Co.*, 54 Cal. 442. The theory underlying these cases seems properly applicable to the principal case, where the ordinance affects not the right, but the mode of repair. In one case as in the other, the value of the undestroyed portion, considered with reference to such uses as may legally be made of it, is materially lessened. Accordingly the amount that would otherwise fairly represent the loss should be increased to the extent of this diminution. See *Brady* v. *Northwestern Ins. Co.*, *supra*. The court, though recognizing this principle, does not seem to apply it accurately. The cost of repairs is not the measure of damages. *Cf.* *Brinley* v. *National Ins. Co.*, 11 Met. (Mass.) 195. It has its bearing merely as evidence of the value of the portions undestroyed. Thus qualified, the doctrine of the principal case seems sound, though no exactly parallel cases have been found. *Cf.* *Peters* v. *Warren Ins. Co.*, 14 Pet. (U. S.) 99.

INSURANCE — FALSE ENTRIES BY MEDICAL EXAMINER — AGREEMENT THAT EXAMINER BE AGENT OF INSURED. — The medical examiner of a life insurance company made material omissions in recording the answers of an applicant. There was an agreement in the application that the medical examiner should be the agent of the applicant. *Held*, that the omissions do not defeat the plaintiff's right to recover on the policy. *Sternaman* v. *Metropolitan Life Ins. Co.*, 170 N. Y. 13.

In the absence of agreement it is generally held that the medical examiner is the agent of the insurer, and that the untruth of the answers as recorded is therefore no defence in an action on the policy, if the applicant was truthful in his oral answers. *Union Ins. Co.* v. *Wilkinson*, 13 Wall. 222; see 15 HARV. L. REV. 583. Whether the medical examiner acted for the insurer or for the insured is a question of fact. See *Dickinson County* v. *Miss., etc., Ins. Co.*, 41 Ia. 286. If he acted under the direction and control of the insured he was the latter's agent. But if, as is usually the case, he acted under the general directions of the insurer, the agreement could not make him the agent of the insured. There seems to have been evidence enough in the principal case to justify the finding that the examiner acted in fact as the company's agent, in spite of the agreement. The case is in accord with earlier decisions. *Gans* v. *St. Paul, etc., Ins. Co.*, 43 Wis. 108; *Whitehead* v. *Germania Ins. Co.*, 76 N. Y. 415.

INTERNATIONAL LAW — EXTRADITION UNDER TREATY MADE WITH PRUSSIA PRIOR TO THE FORMATION OF THE GERMAN EMPIRE. — A German consul asked for the extradition of a fugitive from Prussia, under the Treaty of 1852 between the United States and the Kingdom of Prussia (10 U. S. Stat. 964). On an application for a writ of *habeas corpus*, the prisoner contended that treaty became void by the incorporation of the Kingdom of Prussia into the German Empire. *Held*, that the treaty is still in force. *Terlinden* v. *Ames*, 22 Sup. Ct. Rep. 484. See NOTES, p. 847.

JURISDICTION — FEDERAL INJUNCTION BOND — COUNSEL FEES. — After the dissolution of an injunction obtained in a federal court, an action on the injunction bond was brought in a state court, and counsel fees were allowed, in accordance with the state law, as an element of damages. The obligor on the bond disputed this item, and appealed to the United States Supreme Court on the ground that the judgment deprived him of an immunity which he possessed in the pursuit of an "authority exercised under the United States" (Rev. Stat. § 709). *Held*, that the Supreme Court should assume jurisdiction and reverse the verdict as to the counsel fees. *Tullock* v. *Mulvane*, 22 Sup. Ct. Rep. 372.

In the state courts generally, counsel fees are allowed as damages. *Cook* v. *Chapman*, 41 N. J. Eq. 152; *Corcoran* v. *Judson*, 24 N. Y. 106; *Behrens* v. *Mackenzie*, 23 Ia. 333. The opposite rule, however, prevails in the federal courts. *Oelrichs* v. *Spain*, 15 Wall. (U. S. Sup. Ct.) 211, 231. Since in the principal case the bond was given in a suit in a federal court, the parties should properly be regarded as contemplating that the rules of interpretation applicable to it were those of the federal courts. As a decision on substantive law, therefore, the principal case seems sound. The propriety of allowing the appeal from the state court is not so clear, however. The mere fact that a federal judgment or statute is incidentally involved is insufficient. *Provident, etc., Soc.* v. *Ford*, 114 U. S. 635; *De Lamar's, etc., Co.* v. *Nesbitt*, 177 U. S. 523. But in some cases the treatment of a federal judgment by a state court has been reviewed. *Dupasseur* v. *Rochereau*, 21 Wall. (U. S. Sup. Ct.) 130. And an action on a federal injunction bond, as such, has been carried up. *Meyers* v. *Block*, 120 U. S. 206. While the statute may not literally include this case, the nature of the subject and the need of uniformity make the result reached in the principal case highly desirable.

MUNICIPAL CORPORATIONS — CONSTITUTIONAL LAW — EXTENT OF LEGISLATIVE CONTROL. — *Held*, that a statute authorizing the appointment by the district court of persons to act as trustees of municipal waterworks, is an unconstitutional interference with the right of the municipality to self-government. *State* v. *Barker*, 89 N. W. Rep. 204 (Ia.).

Held, that a statute authorizing the appointment by the governor of a board to control the municipal fire department, is an unconstitutional interference with the right of the municipality to self-government. *State* v. *Fox*, 63 N. E. Rep. 19 (Ind., Sup. Ct.). See NOTES, p. 848.

PENSIONS — EXEMPTION FROM ATTACHMENT — PROPERTY BOUGHT WITH PENSION MONEY. — It is provided by U. S. R. S., § 4747, that "no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure . . . but shall inure wholly to the benefit of such pensioner." *Held*, that the act does not apply after the pensioner has received the money, and therefore does not exempt land bought by him therewith. *McIntosh* v. *Aubrey*, 22 Sup. Ct. Rep. 561.

By this decision, from which three justices dissented, the United States Supreme Court has settled a disputed point in accord with the great weight of authority. *Rozelle* v. *Rhodes*, 116 Pa. St. 129; *Spelman* v. *Aldrich*, 126 Mass. 113; *contra*, *Crow* v. *Brown*, 81 Ia. 344. An argument against the view here adopted has been drawn from the clause "shall inure wholly to the benefit of such pensioner." Furthermore, it is said that the statute, if construed as in the principal case, would add nothing to previously existing law; for, independently of statute, garnishment or equitable attachment would not be available against the United States or its officers, and it would therefore seem impossible to reach the money before its receipt by the pensioner. See *Buchanan* v. *Alexander*, 4 How. (U. S. Sup. Ct.) 20. But looking at the statute as a whole, it seems fair to regard the final clause as merely summing up the particular provisions which precede it, and not as a further sweeping enactment; and the previous provisions are sufficiently clear and definite to justify the decision.

PERSONS — SURRENDER OF INSURANCE POLICY BY INFANT — AVOIDANCE BY EXECUTOR. — An infant took out a life insurance policy, and later surrendered it in consideration of receiving its then cash value. He died before attaining his majority, and his administrator sued on the policy, claiming the right to disaffirm the contract of surrender. *Held*, that the surrender of the policy cannot be avoided. *Pippen* v. *Mutual, etc., Ins. Co.*, 40 S. E. Rep. 822 (N. C.).

The doctrine that an avoidance during infancy of an executory contract cannot be disaffirmed is supported by the only American case on the point; but it is opposed by several English *dicta*. *Edgerton* v. *Wolf*, 6 Gray (Mass.) 453; see *North Western Ry. Co.* v. *M'Michael*, 5 Ex. 114, 127; *Slator* v. *Trimble*, 14 Ir. C. L. 342. The peculiar Michigan rule that contracts cannot be avoided during infancy necessarily reaches the opposite result. See 15 HARV. L. REV. 585. The theory of *Edgerton* v. *Wolf*, *supra*, is that the disaffirmance destroys the first contract and puts the parties in the same position as if none had been made. When, as here, instead of an ordinary disaffirmance of the original contract, there is a new contract of compromise or rescission, the principle protecting infants would strictly seem to allow avoidance of this second contract; but it would be obviously unjust to allow infants to break up arrangements repeatedly. Public policy, therefore, could not well allow a different result from that of the principal case. If, through default in the payment of premiums after the surrender, the policy lapsed, all rights thereunder would clearly be lost.

PROPERTY — CLAIM OF EXECUTOR AGAINST ESTATE — STATUTE OF NON-CLAIM. — A statute barred actions on claims against the estates of deceased persons after two years from the executor's giving bond. An executor, having a claim against his testator's estate which he had failed to present to the court within this period, retained assets sufficient to satisfy the claim. *Held*, that such retention is allowable. *Brown* v. *Greene*, 63 N. E. Rep. 2 (Mass.).

In some jurisdictions an executor may waive the defence of the general statute of limitations in favor of creditors against whose claims the statute has run. See 15 HARV. L. REV. 414. From this it is often said that his right to retain assets to satisfy a similar claim of his own follows by analogy. *Baker* v. *Bush*, 25 Ga. 594. On the other hand an executor is nowhere allowed to waive in favor of other creditors the special statutes concerning the presentation of claims against estates. *Amoskeag Mfg. Co.* v. *Barnes*, 48 N. H. 25. If then the right of retainer is to be governed by analogy, it ought not to cover claims of the executor not presented within the prescribed period. This view has been adopted by some courts. *In re Taylor's Estate*, 10 Cal. 482; *Byrn* v. *Fleming*, 3 Head (Tenn.) 658. It would seem, however, that the right of retainer is in reality based upon the executor's holding the legal title to the property from which he seeks satisfaction. See *Spencer* v. *Spencer*, 4 Md. Ch. 456. Accordingly, statutes limiting the time for bringing actions do not affect his right, because at no time has he ever had a right of action against himself as executor. See *Trimble* v. *Fariss*, 78 Ala. 260. The principal case thus reaches a sound result; and it is supported by authority. *Sanderson's Adm.* v. *Sanderson*, 17 Fla. 820; *Stahlschmidt* v. *Lett*, 1 S. & G. 415.

PROPERTY — COVENANT OF WARRANTY — TOTAL FAILURE OF TITLE. — The defendants, husband and wife, had joined in a warranty deed granting to the plaintiff certain lands held in the wife's right. Title had completely failed. The defendants impleaded the wife's grantor, who had given a covenant of warranty. *Held*, that the

plaintiffs can recover on the husband's covenant, while the wife, though not liable herself in this action, can recover from her grantor the purchase money which she paid. *Johnson* v. *Blum*, 66 S. W. Rep. 461 (Tex., Civ. App.).

The decision, so far as it allows the wife to recover, was made reluctantly and was rested on previous Texas authority. The theory of the cases relied on seems to be that when, after any conveyance of realty, title fails completely, there is such failure of consideration as to create a *quasi*-contractual right to recover the purchase price. See *Rayner Cattle Co.* v. *Bedford*, 91 Tex. 642, 646, 650. Since recovery was not allowed against the wife in the principal case, this right seems to have been illogically limited to cases where there is a binding covenant for title. It would appear just and logical to allow the right whenever the deed purported to convey a good title, independently of the question whether there was a binding covenant of warranty. But the rule is almost universal that, in absence of fraud, the grantee's only relief, either in law or equity, is upon the covenants in his deed. See 8 HARV. L. REV. 119.

PROPERTY — FIXTURES — EFFECT OF NEW LEASE ON TENANT'S RIGHT OF REMOVAL. — The purchaser of a leasehold interest and certain fixtures took a new lease from the landlord for the remainder of the term, without reserving the right to remove the fixtures, and then mortgaged his term and the fixtures to the plaintiff. The latter bought them in at the foreclosure sale, and replevied the fixtures from the landlord. *Held*, that the right of removal was not lost by acceptance of the new lease, and passed to the plaintiff by his purchase. *Bernheimer* v. *Adams*, 70 N. Y. App. Div. 114. See NOTES, p. 853.

PROPERTY — POWERS — COVENANT BY DONEE OF SPECIAL TESTAMENTARY POWER OF APPOINTMENT. — The donee of a special testamentary power of appointment covenanted to appoint a certain *minimum* to some of the objects of the power. *Held*, that the covenant is absolutely void, and a failure so to appoint gives no right to damages from the covenantor's estate. *In re Bradshaw*, [1902] 1 Ch. 436.

The fact alone that the power was exercisable only by will hardly accounts for the decision, since a covenant to exercise a similar general power is valid. *In re Parkin*, [1892] 3 Ch. 510. It is established, however, that an appointment under a special power is bad if it involves a benefit for the appointor. *Wellesley* v. *Mornington*, 2 K. & J. 143. Here, if the covenant is valid, an appointment which would discharge the appointor's obligation would serve his personal interests, and should logically be held bad; and those persons in whose favor the covenant ran would thus be excluded from any possibility of taking. Moreover, the existence of a valid covenant would tend to bias the appointor's choice. The principal decision makes this doubly undesirable situation impossible and fits in with decisions that appointments in accordance with such covenants are good. See *Palmer* v. *Locke*, 15 Ch. D. 294. It has, however, been pointed out that the principal case is inconsistent with the decisions that a covenant by a donee not to appoint extinguishes a special power. 18 L. QUART. REV. 112. But such decisions themselves seem anomalous, being based on an unnecessary extension of an earlier rule that the power is extinguished if the donee creates an entirely new estate by a valid fine or recovery. See *Smith* v. *Death*, 5 Madd. 371; and *cf.* *Horner* v. *Swann*, Tur. & Rus. 430.

PROPERTY — REMOTE APPOINTMENT — ELECTION. — The donee of a special power made by will an appointment which was void for remoteness. He also left in the same will a bequest of certain of his own property to X, who was one of the class to take in default of appointment under the power. *Held*, that X must elect between his interest under the will and his interest in default of appointment, and if he chooses the former the appointment must be carried out. *In re Bradshaw*, [1902] 1 Ch. 436.

It is apparently well settled that where the donee of a special power makes in the same will an appointment to persons not objects of the power, and a devise or bequest from his own property to one who would take in default of appointment, the latter if he takes under the will must carry out its provisions in regard to the property appointed. *Whistler* v. *Webster*, 2 Ves. Jr. 367. But according to some authorities there is no case for election if the appointment, though to proper objects, is too remote. *In re Warren's Trusts*, 26 Ch. D. 208; *In re Handcock's Trusts*, L. R. 23 Ir. 34; see also *Wollaston* v. *King*, L. R. 8 Eq. 165. It is said in support of this distinction that to enforce election in such cases is to aid an attempted infraction of the rule against perpetuities. An answer to this reasoning has, however, been pointed out, and the distinction disapproved. GRAY, PERP., §§ 541–561; see *Albert* v. *Albert*,

68 Md. 352. For those ineffectually appointed take by transfer from the one who elects, not under the power. See SUG., POW., 8 ed., 578, 583. Therefore their estates are not to be measured as regards remoteness from the time of the creation of the power. If it were impossible to carry out the intended appointments because still too remote, election would probably not be enforced.

PROPERTY — RIPARIAN OWNER — RIGHT TO SPECIFIC WATER WHICH WOULD NATURALLY FLOW. — A riparian owner intermittently diverted water from a stream, but turned into the stream other water from a different source. *Held*, that the lower court properly refused to instruct that the plaintiff must be restricted to nominal damages if the total flow of the stream was undiminished, since a riparian owner's right is to receive the specific water which would naturally flow by his premises. *Commissioners of Aberdeen* v. *Bradford*, 51 Atl. Rep. 614 (Md.).

The discussions of courts on riparian rights are usually ambiguous in their bearing on the right to specific water. Where the language is broad enough to imply such a right, it seems generally to have been used loosely, the court not having this point in mind. The only decision found is opposed to the doctrine of the case under discussion. *Elliot* v. *Fitchburg R. R. Co.*, 10 Cush. (Mass.) 191. Since a riparian owner's right is simply a right to the beneficial use of the stream, it is submitted that he should be allowed an action only when his use is made less beneficial by an unfavorable variation in the quantity or quality of the water, or in the regularity of its flow. The recognition of the right to specific water would not confine recovery within these limits. The actual decision of the principal case, however, is supportable on the ground that the instructions requested did not take into consideration a possible interference with the regularity of the flow of the stream. *Cf. Ware* v. *Allen*, 140 Mass. 513.

QUASI-CONTRACTS — PAYMENT TO AGENT — LIABILITY OF UNDISCLOSED PRINCIPAL. — The defendant sold land at auction through his agent. The plaintiff contracted to purchase, believing the agent to be the real vendor. Payment was to be made within ten days. After the expiration of this time, the agent accepted a part payment on the contract, the plaintiff still believing him to be the principal. The agent then absconded with the money. The plaintiff having failed to complete the purchase, the defendant resold, and the plaintiff sued for money paid. *Held*, that as the agent had no authority to extend the time, the plaintiff cannot recover. *McKiernan* v. *Valleau*, 51 Atl. Rep. 102 (R. I.).

The court apparently assumed that the *quasi*-contractual action would be governed by the principles of agency in the same way as an action on the contract. But under this assumption it seems difficult to support the decision, for the defendant could not deny that payment to an agent, whose apparent authority to deal with the land was unlimited, would extinguish, *pro tanto*, the contractual liability. *Stebbins* v. *Walker*, 46 Mich. 5; *Blackburn* v. *Scholes*, 2 Camp. 341, 343. It should be remembered, however, that *quasi*-contractual liability depends solely upon unjust enrichment of the defendant at the plaintiff's expense. *National Trust Co.* v. *Gleason*, 77 N. Y. 400; see 15 HARV. L. REV. 677. It is equitable in its nature and the rules of agency should be applied only when leading to equitable results. In the principal case it would seem, therefore, that the defendant is rightly protected, since he never received the money and did not induce the payment. The agent, of course, would be liable *quasi*-contractually. *Newell* v. *Tomlinson*, L. R. 6 C. P. 405. If, however, the principal's existence had been known to the purchaser, the *quasi*-contractual action could have been maintained. *Cary* v. *Webster*, 1 Str. 480. In such a case the ordinary doctrine that payment to the agent is payment to the principal yields equitable results and is therefore properly applied. See *Matthews* v. *Haydon*, 2 Esp. 509.

SALES — WAREHOUSE RECEIPTS — PRIORITY. — A warehouseman borrowed money from the defendant and gave as collateral security negotiable warehouse receipts for specified goods. Later the warehouseman issued other receipts for the same goods to the plaintiff. The defendant afterward renewed his receipts by delivering them up and receiving new ones in their stead. *Held*, that though the plaintiff's receipts were void by statute when issued to him, because other receipts were outstanding, yet the legal title to the goods attached to those receipts as soon as it was revested in the warehouseman by the return of the defendant's receipts for renewal, and the plaintiff thus became entitled to the goods. *Roche* v. *Crigler*, 67 S. W. Rep. 273 (Ky.).

The court relies on a previous case in which the first set of receipts was delivered

up absolutely, so that the holder of them retained no claim whatever on the goods. *Block* v. *Oliver*, 102 Ky. 269. It was there held that the legal title passed instantly to the holder of the previously invalid receipts. Such a doctrine presents technical difficulties; but the holder of the second set of receipts ought certainly to have full rights against the warehouseman, and to work out these rights by holding that he instantly gets legal title is a simple method, probably conforming with mercantile understanding and not open to serious practical objection. It should be recognized, however, that the doctrine seems supportable only on principles of justice and convenience and is to be extended with caution. In the principal case the receipts were delivered up on trust for an immediate reconveyance, and the entire beneficial interest, so far as required for his security, was retained by the defendant. Under such circumstances no rights in favor of the plaintiff, based on a claim not otherwise affecting the defendant, should be allowed to attach. *Cf. Eyre* v. *Burmeister*, 10 H. L. Cas. 90. The reissue to the defendant should, then, restore his legal title unimpaired.

SALES — WARRANTY — WAIVER BY ACCEPTANCE. — The defendant agreed to purchase a number of wooden tables, "to be properly set up and polished" by the plaintiff. Tables furnished under this contract were accepted by the defendant, and part of them were sold. In an action for the price, the defendant claimed that the above stipulation constituted a warranty, and counter-claimed for breach of it. *Held*, that by acceptance of the tables, he lost his right to damages under the warranty. *Albin Co.* v. *Kentucky Table Co.*, 67 S. W. Rep. 13 (Ky.).

In most states the buyer's right to sue for breach of warranty may survive an unconditional acceptance of the goods, even though the defect is easily discoverable at the time. *Underwood* v. *Wolf*, 131 Ill. 425. The jury may, however, find an implied agreement to compromise the claim by receiving the defective goods in satisfaction. See *Morse* v. *Moore*, 83 Me. 473, 481. On the other hand, some courts have adopted the view that acceptance always precludes any claim under the warranty. *Olson* v. *Mayer*, 56 Wis. 551. Although on principle damages should be recoverable for breach of contract in many of these cases, yet injustice would often result from allowing a buyer to recover after the goods are consumed and the seller's sources of evidence destroyed. Perhaps a wiser rule than either of those mentioned would make notice given by the buyer within reasonable time a condition of bringing action. In practice, however, the prevalent rule probably approaches this result, as judge and jury will naturally give considerable weight to a failure to give such notice, as evidence of bad faith.

STATUTE OF LIMITATIONS — ADVERSE POSSESSION OF HIGHWAY. — The defendant remained in adverse possession of a public street for the statutory period. Ejectment was brought by the city. *Held*, that the defendant has acquired title, and that the public easement is lost. *City of Hastings* v. *Gillitt*, 88 N. W. Rep. 987 (Minn.). See NOTES, p. 846.

TAXATION — INHERITANCE TAX — WAR REVENUE ACT OF 1898. — A Spanish subject died in Paris, leaving a will executed in Paris according to Spanish law. Under the will his son took one third of the testator's personal property, and the other two thirds descended to the son by the Spanish intestate law. At the time of his death, the testator owned bonds of American corporations, which were in the custody of his agents in New York. *Held*, that the passing of such bonds is not subject to the tax imposed by the War Revenue Act of 1898 upon "property passing by will or by the intestate laws of any state." *Eidman* v. *Martinez*, 22 Sup. Ct. Rep. 515.

A Frenchwoman, temporarily in New York, executed a will according to New York law, by which she bequeathed all her personal property to a daughter domiciled in Germany. The testatrix, at the time of her death in Switzerland, owned a chose in action against a New York firm, and stocks and bonds of American corporations. *Held*, that the passing of such property is not subject to the War Revenue Act tax. *Moore* v. *Ruckgaber*, 22 Sup. Ct. Rep. 521.

In general, the law of the owner's domicile regulates the devolution of personal property. *Dammert* v. *Osborne*, 141 N. Y. 564; *Ennis* v. *Smith*, 14 How. (U. S. Sup. Ct.) 400, 424. A succession tax on the privilege of taking may therefore be imposed there, wherever the property may actually be. *Matter of Estate of Swift*, 137 N. Y. 77, 88. It is also true that personal property within the jurisdiction may be

taxed, regardless of the owner's domicile. *Hoyt* v. *Commissioners*, 23 N. Y. 224; *New Orleans* v. *Stempel*, 175 U. S. 309. Accordingly the legislature may, by an explicit statute, tax the descent of such property. *Matter of Estate of Romaine*, 127 N. Y. 80. But the ordinary inheritance tax is properly construed as levied upon the devolution, as a privilege, and not upon the property itself. *United States* v. *Perkins*, 163 U. S. 625, 628; *Magoun* v. *Illinois, etc., Bank*, 170 U. S. 283, 288. Tax statutes are strictly construed, and cover only cases clearly included. *Wroughton* v. *Turtle*, 11 M. & W. 561, 567. On these principles, the Act of 1898 seems to tax the succession at the domicil and not the property where found. *United States* v. *Hunnewell*, 13 Fed. Rep. 617; *contra*, *Alvany* v. *Powell*, 2 Jones Eq. (N. C.) 51. It would have been easy to use words specifically including all property within the jurisdiction had such been the intention of Congress. See *Commonwealth* v. *Smith*, 5 Pa. St. 142; *Callahan* v. *Woodbridge*, 171 Mass. 595. The failure to do so, and the fact that property passing by intestate laws of foreign countries seems clearly outside the words of the act, reinforce the general considerations stated above and justify the decisions in the cases under discussion.

TORTS — DEATH BY WRONGFUL ACT — DEATH NOT INSTANTANEOUS. — The plaintiff's intestate sustained personal injuries through the negligence of the defendant, and several hours later died from these injuries. The plaintiff, as administratrix, brought the usual statutory action for his death. *Held*, that a right of action accrued to the intestate in the interval before his death, which by statute survives to his personal representative, and that in such cases the statute relating to death by wrongful act has no application. *Jones* v. *McMillan*, 88 N. W. Rep. 206 (Mich.). See NOTES, p. 854.

TORTS — LIBEL — STATEMENT LIBELLOUS ONLY IN CONNECTION WITH FACTS UNKNOWN TO DEFENDANT. — The defendant, a newspaper publisher, printed a notice stating that the plaintiff's wife had given birth to a child. The plaintiff had been married only a month, but of this fact the defendant was ignorant. The notice was untrue. *Held*, that the plaintiff has a cause of action. *Morrison* v. *Ritchie & Co.*, 39 Scot. L. Rep. 432; 112 L. T. 472.

Formerly a defendant was responsible only for publications libellous to his knowledge. *Dexter* v. *Spear*, 4 Mason (U. S. Circ. Ct.) 115; *Smith* v. *Ashley*, 11 Met. (Mass.) 367. But on grounds of sound public policy, the law now requires a defendant to know at his peril the usual construction and implication of his words. See *Hanson* v. *Globe Newspaper Co.*, 159 Mass. 293, 299; ODGERS, LECTURES ON LIBEL, 74. Liability, therefore, is now extended to the intentional or negligent publication of all matter libellous in itself. *Vizetelly* v. *Mudie's Select Library*, [1900] 2 Q. B. 170. But where, as in the principal case, the words themselves have no libellous sense, but are rendered defamatory only in connection with existing facts known to readers, this rule of policy is not involved. In this class of cases, if a defendant knows the additional facts, he should clearly be responsible on the ground of intentional defamation. See ODGERS, LIBEL AND SLANDER, 3d ed., 120. But if he is ignorant of the facts, it seems just that he should be liable only if his lack of knowledge was occasioned by negligence. See *Capital, etc., Bank* v. *Henty*, 7 App. Cas. 741, 771; *cf. Hanson* v. *Globe Newspaper Co.*, *supra*. Such a doctrine would be in accord with the usual principles of liability in tort. The decision in the principal case, which intimates that the defendant should be liable regardless of negligence, seems unnecessarily to extend the absolute liability for the defamatory effect of the words published, which is imposed by the rule of policy above mentioned.